IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 239

ESTATE OF ARLESTER L. BURNELL, Ward,
Appellant,

vs.

STATE OF COLORADO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF COLORADO

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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ARGUMENT

1. The Record Does Not Support Colorado's Argument That the Decision Below Rests on a Non-Federal Basis, for the Supreme Court of Colorado Explicitly Based Its Findings Solely on the Federal Constitutional Question.

The Probate Court summed up the basis of its decision by saying:

> "The application of these statutory provisions to criminal commitments creates unequal treatment, is repugnant to the provisions concerning equal protection and is, therefore, unconstitutional.
>
> 'A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification.' *Department of Mental Hygiene* v. *Evelyn Kirchner*, 388 P.2d 720, 36 Calif. Reptr. 488 (en banc, January 30, 1964). Vacated, 380 U.S. 194, 13 L.Ed.2d 753 (1965)." [Jurisdictional Statement, p. A3]

The Colorado Supreme Court considered the constitutionality of the statute in question solely as it related to the prohibition in the Fourteenth Amendment against unequal treatment. In analyzing the case before it from the Denver Probate Court, the Court brought the Federal question sharply into focus by the following language:

> "In holding the statute unconstitutional as applying to a criminally insane person, the Probate Court held it violative of the equal protection guarantee of the Fourteenth Amendment to the United States Constitution. . . . The court found unequal protection on the assumption that those found guilty of crime and those found not guilty by reason of insanity are of the same class and that they are accorded different and unequal treatment under the law." [Jurisdictional Statement, p. A6]

The Colorado Supreme Court made doubly clear that it was discussing the principle of equal protection by citing *Landwehr* v. *Regents of the University of Colorado*, 156 Colo. 1, 396 P.2d 451, where the Court said that the principal arguments of *Landwehr* were based on the equal protection, due process, and the privileges and immunity clauses of the Constitution of the United States, and proceeded to decide the Federal questions.

The Colorado Supreme Court also quoted language from *Driverless Car Co.* v. *Armstrong*, 91 Colo. 334, 14 P.2d 1098 [Jurisdictional Statement, p. A8]. The first part of the paragraph quoted was omitted by the Court but did set forth the basis for the conclusions in the *Driverless Car* case. The omitted preceding sentences are as follows:

> "It is urged that the provisions in question offend against the provision of the Fourteenth Amendment to the Constitution of the United States forbidding a state to make or enforce any law denying any person the equal protection of the laws. The argument in support of this objection challenges the classification adopted by the legislature."

Denial of equal protection has been the thrust of the argument of the appellant throughout the presentation of his case beginning with the Probate Court. Under the admitted facts, the extent of the invasion of appellant's rights is so great, so arbitrary, so oppressive and unreasonable, that it goes to the denial of equal protection and due process under the Federal Constitution.

The Colorado Court was clearly dealing with a federal question when it held that there was no *inequality* of treatment since Colorado statutes require that convicts at the State Penitentiary pay and satisfy the cost of their maintenance and retention. [This argument is wholly without merit, having been presented to the Colorado Supreme Court on Motion for Rehearing. Inquiry has established that as a matter of fact and policy the State Penitentiary has never charged a prisoner for his maintenance and care.]

2. The Injection of the Argument That Article II, Section 25, of the Constitution of the State of Colorado Was the Non-Federal Basis of the Decision Is Spurious.

Article II, Section 25, is the general due process clause of the Colorado Constitution which simply provides:

> "No person shall be deprived of life, liberty nor property without due process of law."

Section 1 of the Fourteenth Amendment to the United States Constitution is similarly worded. The Colorado Constitution, however, has no clause which parallels the equal protection clause of the Fourteenth Amendment.

Counsel for the State argue that since the appellant cited the due process clause in the State Constitution of Colorado in his arguments before the State Supreme Court, that necessarily it must be assumed that the Colorado Supreme Court was basing its decision upon the State Constitution. There is utterly no logic in counsel's argument that this "imposed upon the Court the task of deciding whether the inclusion of the criminally insane within the provisions of said statute and the exclusion of convicted criminals therefrom constituted discrimination prohibited by Colorado and Federal due process." It is obvious from reading the Court's decision that it did not deem the issue to be one of general due process, but rather one of equal protection. It is significant that the Court did not once mention the Colorado Constitution nor did it ever use the phrase "due process." On the contrary, the Court consistently discussed the problem of equal protection.

It is apparent from the arguments presented in the Motion to Dismiss that counsel is attempting to manufacture a non-federal basis for the decision below by attempting to equate general due process with equal protection. They

were compelled to do this since the Colorado Constitution has no provision which is analogous to the equal protection clause. If this were true and the Court below had referred to such a clause in the Colorado Constitution, then we would have a situation comparable to that in *Department of Mental Hygiene of California, Petitioner,* v. *Evelyn Kirchner, Administratrix,* 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871. In that case California did have a provision in its Constitution that "All laws of a general nature shall have a uniform operation." In that case the Supreme Court of California mentioned the equal protection clauses of both the State and Federal Constitutions in its opinion, and this Court held that it was unable to ascertain whether the lower Court's decision rested on the Federal or the State provisions, and accordingly remanded the case for a determination. The case at bar is easily distinguishable from *Kirchner* in that the Colorado Supreme Court mentioned no State Constitutional provision whatsoever and, further, its decision could not have rested upon a State ground of equal protection since the Constitution of Colorado has no equal protection clause.

The situation here is not comparable to that in *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493, cited by counsel for Colorado. In the Jankovich case, there was a co-existence of Federal and State due process grounds, and the State Court opinion was based explicitly upon both State and Federal Constitutions, this Court holding that the non-federal basis of the decision was adequate. In this case there was no explicitly stated co-existence of Federal and State grounds. On the contrary the Colorado Supreme Court ruled as it did because it was interpreting the equal protection clause

of the Fourteenth Amendment. *Minnesota* v. *National Tea Co.*, 309 U.S. 544, 84 L.Ed. 922; *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 95 L.Ed. 3, 71 S.Ct. 1; *State Tax Commission* v. *Van Cott*, 306 U.S. 511, 83 L.Ed. 950, 59 S.Ct. 605; *Perkins* v. *Benguet Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413.

3. The Question Decided by the Court Below Was Not Only Federal in Nature but Is Admittedly a Substantial One.

The Motion to Dismiss filed by the State of Colorado does not dispute the fact that the issues presented in this appeal are of widespread importance. In effect Colorado has conceded the importance of the question.

Although counsel for the appellant do not have information relating to all of the states, we are aware that many of the 42 states having legislation permitting the collection from the estates of incompetent persons for maintenance (as referred to in *Kirchner* in the footnote in the official reports on page 201) do have statutory powers to so collect from the estates of those committed as criminally insane. In *Kirchner* 8 states filed amicus briefs in this Court.

CONCLUSION

It is clear from the record that the decision in the Colorado Supreme Court rested solely upon the equal protection provisions of the Fourteenth Amendment and that the argument of counsel for Colorado that there was present a non-federal issue based upon the general due process clause of the Colorado Constitution is utterly without foundation. The question presented is properly before this

Court and is of such substantial nature that it warrants a finding of jurisdiction.

Respectfully submitted,

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